

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4123 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
 2. To be referred to the Reporter or not? Yes
 3. Whether Their Lordships wish to see the fair copy of the judgement? No
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?

No

VISHAL LINES PVT LTD

Versus

GENERAL MANAGER

Appearance:

MR RD PATHAK for Petitioners
UNSERVED-REFUSED (N) for Respondent No. 2
MR DG CHAUHAN for Respondent No. 3
MR KAMAL MEHTA for M/S MG DOSHIT & CO for Respondent No. 4, 5

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 21/04/99

ORAL JUDGEMENT (per R. Balia, J.)

The petition raises a short issue. The facts necessary for the present purposes may first be noticed.

2. Petitioner No. 1 is a private limited company having its registered office at Thakkerbapa Nagar, National Highway, Ahmedabad. It is engaged in the business of manufacture of lime, cement paint and lime material. It is a dealer registered under the Gujarat Sales Tax Act, 1969 as well as under the Central Sales Tax Act, 1956. In exercise of its powers u/s 49(2) of the State Act, the State Government, by issuing Notification, inserted Entry 175 granting exemption from payment of tax on purchases of raw material, processing material, consumable stores or packing materials from a person who is not a registered dealer, on sales of raw materials, processing materials, consumable stores or packing materials by a registered dealer to a specified manufacturer as well as on sale of goods by a specified manufacturer of goods manufactured by him and on purchase of prohibited goods other than declared goods for use in the manufacture of textile goods on certain terms and conditions mentioned in the Notification with which we are not presently concerned. The exemption is in favour of a specified manufacturer. Under Annexure-I appended to the said entry 'specified manufacturer' was defined to mean a person in the State of Gujarat who establishes the new industry after 1st June, 1980 but not after 31.3.1991 in any of the designated areas. The latter date was extended from time to time upto 31.3.1993. One of the conditions for claiming exemption is that if a specified manufacturer has obtained an eligibility certificate from the Industries Commissioner or, as the case may be, the General Manager of the District Industries Centre concerned stating, inter alia, that the new industry has been commissioned on the date specified therein being any date during the period commencing on 1.4.1986 and ending on 31.3.1991 (now 31.3.1993) in any of the designated areas and after obtaining eligibility certificate he has applied for the exemption certificate to the Commissioner of Sales Tax. Though, in the first instance, eligibility certificate was refused, during the pendency of this petition, by order dated 16.3.1999, the petitioner has been granted an eligibility certificate determining the amount of tax exemption upto which the petitioner can claim the benefit under entry 175 at Rs. 21,00,565. In computing this amount, long term borrowed capital, as distinct from working capital, has been included in computing the capital invested for the purpose of computing the maximum benefits derivable under the exemption entry. Under Annexure-V appended to the entry, quantum and period of exemption has been stated. The petitioner falls in Item B of the Table under Part III of the Annexure-V,, that is to say, he can avail exemption of tax upto 70% of the fixed capital investment

or Rs. 2.5 crores whichever is less within the period of 12 years from the date of commencement of commercial production.

3. In short, it is not in dispute that the petitioner is a specified manufacturer having established a new unit entitled to claim exemption under the entry subject to fulfillment of the conditions and that in computation of capital investment borrowed sum is also to be included which represent the fixed capital investment. It is also not in issue that asset acquired by the petitioner is plant and machinery and cost of which is otherwise part of fixed capital investment in the new unit. The maximum monetary limit of tax exemption is directly related to the amount of fixed capital investment by a prescribed percentage of that sum, subject to a maximum of Rs. 2.5 crores.

4. The limited question that is raised for our consideration is whether computation of fixed capital investment in the aforesaid circumstances would exclude the amount which is outstanding and to be paid to the supplier of fixed capital asset, namely, the land, building construction and plant and machinery on the ground that the same has not been paid. The contention of the petitioner is that unquestionably when the money borrowed for fixed capital investment has been included in computing fixed capital investment, there is no reason why the amount which represents liability to be discharged for acquisition of fixed capital asset be excluded merely because instead of borrowing capital from the market, the supplier of fixed capital assets may himself act as the lender by deferring the payment, making the outstanding against the acquisition of such capital investment, as borrowed capital for the purpose of capital investment in the new industry, expansion or diversification, as the case may be, by the petitioner.

5. On the other hand, it has been contended by learned counsel for the revenue, Mr. Kamal Mehta, that the term 'capital investment' has not been defined under Entry 175. Entry 175 is an outcome of the Government Resolution dated 6th May 1986 laying down the policy of the State Government for granting incentive package with a view to secure balanced development of industries in the State through acceleration of the pace of industrial development of less developed areas of the State. The package incentive includes the sales tax incentives in two forms, namely, sales tax exemption as well as sales tax deferment. In the Resolution of the State Government dated 6th May 1986 the term 'eligible fixed capital

investment' has been defined. Referring to that definition, it was pointed out by learned counsel that only those assets which are 'acquired and paid' during the operative period of the scheme will be eligible for sales tax incentive under this scheme. According to him, the condition of 'acquisition and paid' refers to actual payment to the supplier for the acquisition of the eligible fixed assets for the purpose of computing capital investment as pre-requisite for its inclusion in fixed capital investment for the purpose of determining the maximum limit upto which the benefit of incentive can be availed. However, he joined no issue on the question that in computing fixed capital investment, borrowed capital is not to be reduced from the acquisition price of the new building, lands, plant and machinery and the amount spent by way of technical know-how fees, or drawing fees paid in lumpsum to foreign collaborators or foreign suppliers as approved by the Government of India or paid to laboratories recognised by the Central Government or State Government, if the same is borrowed from other sources.

6. The Notification issued u/s 49(2) granting exemption under the Sales Tax Act is legislative in character and has to be construed as subordinate legislation. The Government Resolution independent of sec. 49(2) laying down policy generally, ordinarily cannot be looked into as part of the Notification, while construing the provisions of the Notification. However, where legislative instrument using particular phrase or words is itself not clear, either for want of any definition or because of the multiple construction that can be put to the expression used in that legislation, aid of other material may have to be invoked. One has to look at the object with which legislation has been brought into effect, the circumstances which lead to the making of such legislation as well as contemporaneous meaning, if any, given to the expression used in the legislative instrument by those who are entrusted with the task of implementation of the scheme of the said legislation.

7. We find that the Notification granting exemption, while laying down the conditions in Annexure-I appended to Entry 175, in Annexure-II defines certain expressions used in the entry. The expressions which has been defined in Annexure-II are, 'specified manufacturer', 'new industry', 'expansion', diversification, 'new industry in process', 'resource based new industry', 'pioneer new industry'. But it has not defined the term 'capital investment', though in Annexure V which fixes

the maximum limit of amount upto which and period within which such exemption by the assessee can be availed by the assessee under the entry, phrase 'fixed capital investment' has been used in Explanation (1) to clause (b) of Annexure II in defining Expansion and diversification with reference to which the maximum limit of monetary quantum is to be determined, which can be enjoyed by the person during the period, also fixed under different Tables of Annexure V. It is not the case of either of the parties that the term 'capital investment' in the notification includes investment in all assets which can properly be called in common parlance to be capital investment or capital expenditure, but is confined to certain specified investments. There is intrinsic evidence that the notification is in furtherance of the policy disclosed in Government Resolution dated 6.5.1986 and that insertion of entry 175 u/s 49 as well as 'sales tax deferment scheme' are both alternate to each other which are the two tax incentives offered under the said Resolution dated 6.5.86. In Note 1 appended to Entry 175, it has been stated, 'in option of this entry, sales tax deferment scheme is offered (See Resolution No. INC-1986-706(2) I dated 6.5.86 with F.D.'s resolution No. GST-1086-2507-TH dated 16.6.87)).

8. We are also of the opinion that the term 'capital investment' is not a term of art or a term which is capable of only one single meaning. It depends on the surrounding circumstances in which the term has been used having reference to context and object with which the term has to be construed. In given circumstances, the term 'capital investment' may include long term borrowed capital but it is not necessary that in all circumstances borrowed capital is part of capital investment for all purposes. There is divergence of opinion about inclusion of short term borrowings in computing the capital investment generally.

9. Somewhat similar expression has been used in Income-tax Act for granting tax benefit to the assessee under the Act in respect of profits or gains derived from any industrial undertaking to which the provisions of tax concession applies. In sec. 15C of the Indian Income-tax Act, 1922, which was inserted w.e.f. 31.3.1949, it was provided that "tax shall be payable by an assessee on so much of the profits or gains derived from any industrial undertaking to which this section apply as do not exceed 6% per annum on the 'capital employed' in the undertaking computed in accordance with the rules as may be made in that regard by the Central Board of Revenue. When Indian Income-tax Act 1922 was

repealed and Income-tax Act 1961 was enacted corresponding provision found place in sec. 84 of the I.T. Act, 1961 which also provided for exemption from tax liability to the extent of 6% p.a. on the capital employed in the industrial undertaking or a hotel. Section 84 was replaced by sec. 80J in 1968. Under the rules framed under the said Act, the borrowed capital was sought to be excluded from the computation of 'capital employed' for the purpose of computing the tax concession. In the above context when the matter was considered by the Supreme Court in Lohia Machines Ltd. and anr. v. Union of India and others, (1985) 152 ITR 308, the Court after referring to a large number of text-books on accounting principles observed,

"It is obvious that the expression "capital employed" is not a term of art nor is it an expression having a fixed connotation or meaning but it is susceptible of varied meanings, including or excluding short-term borrowings or long-term borrowings, whether of all categories or of any particular category or categories, depending on its environmental context."

10. To adopt the expression "environmental context" in the present case, the same is provided by the Resolution dated 6th May 1986 from which the expression "capital investment" can derive its colour. Insertion of Entry 175 took place on 23rd December 1986. The Government Resolution was made on 6th May 1986 which declared that with a view to secure balanced development of industries in the State through acceleration of the pace of industrial development of the less developed areas of the State and promoting the growth of industries away from cities, Government of Gujarat had approved a package of incentives. The package of incentives includes subsidy and sales tax incentives. In pursuance thereof, the scheme known as Sales Tax Incentive Scheme for Industries 1986 was unfolded in the said resolution. Under clause 6 of the scheme it was postulated that eligible units under this scheme will have option to choose one of the two sales tax incentives, namely, (a) Sales Tax Exemption, and (b) Sales Tax Deferment. It further provided that under sales tax exemption incentive, an eligible unit shall be entitled to purchase free of sales tax, raw materials, packing material and processing materials utilised for the purpose of manufacturing goods. In addition to this, it will also be exempted from payment of sales tax on sale of goods manufactured by it. The quantum of sales tax exemption will be as per Annexure 'C'. It further provided that

alternatively, a unit will be allowed to opt for the scheme of sales tax deferment. Under the sales tax deferment, the recovery of sales tax payable by the unit on sale of its products will be deferred and amount so deferred will be recovered in six annual installments by Sales Tax Department after the expiry of the prescribed period/time-limit during which deferment is available. No interest was to be charged on the amounts so deferred. The quantum of deferment benefit was to be as per Annexure 'D' to the resolution. In Annexure A, Annexure C and Annexure D respectively, quantum was specified with reference to fixed percentage of fixed capital investment made in the eligible units.

11. This being the scheme, the benefit of this scheme was extended to new industrial units as well as to existing industrial units going for expansion and diversification. It also excluded certain industries from the purview of this benefit expressly. As benefit has been extended to new industrial units the expansion as well as diversification of existing units, the resolution defined the eligible fixed capital investment with reference to which the incentive offered by the Government Resolution was to be computed, which reads as under:

"Eligible fixed capital investment" means investment in,

- land: the actual price paid for the land to the extent needed but excluding land development charges
- new building
- new plant and machinery and imported second hand machinery and installation expenditure capitalised for plant & machinery
- capitalised interest during construction not exceeding 5% of the total fixed capital investment
- technical know-how fees or drawing fees paid in lumpsum to foreign collaborators or foreign suppliers as approved by Government or paid to laboratories recognised by the State Government or Central Government.

12. There is no room for doubt on reading the Government Resolution dt. 6.5.86 and subsequent insertion of entry 175 vide notification u/s 49(2), that inserting entry 175 was direct result of Resolution dated 6th May 1986 for the purpose of implementing it inasmuch as exemption of the nature engrafted in Entry 175 was

envisaged in the said resolution as one of the alternative incentives since such exemption from tax could not have been granted except by issuing notification u/s 49(2) merely by way of an executive order, whereas deferment of the collection of sales tax payable under the provisions of the Act to the extent desired by the State could have been made by dint of an executive order, the notification followed the resolution. Thus, to the extent the Notification u/s 49(2) has deviated from the scheme unfolded in the resolution dt. 6.5.86, either by defining itself the terms used in the notification or prescribing limits of the exemption and the conditions for availing exemptions, the resolution may not override the Act. However, in case of any doubt about the true manner of the expression used in the notification as environmental context, it is permissible to look at the resolution dated 6th May 1986.

13. In these circumstances it will be legitimate to look at the said Government Resolution to find the true meaning of any term used in notification but not defined therein, though the same has been defined under the resolution dt. 6.5.86, that led to issuance of notification and by making reference to it in the notification, it adopted the scheme of 'sales tax deferment' as alternate to the exemption.

14. As we have noticed above, the scheme is for the purpose of granting incentive to make capital investment by way of establishing new industrial unit or by way of expanding the existing unit or bringing into existence diversification of the existing units as contemplated under different provisions of the resolution in the designated areas. The resolution as well as notification has defined the term "new industrial unit", "expansion", and "diversification". The expansion and diversification, as defined under the resolution as well as under the notification, postulate substantial increase in the production capacity of original installed capacity as well as substantial increase in total fixed capital investment in diversification and expansion. It is to be noticed in the context of present controversy that while expansion as well as diversification, both refer to increase in the value of fixed capital investment by not less than 25% of the net fixed asset of the existing project, which suggests that capital investment has direct relation for the purpose of achieving the object of balanced development of less developed areas of the State. Emphasis is on large amount of capital investment being made in those areas and that is by way of referring to the investment in fixed assets. The fact that there

is no dispute about the expression to the extent if considers investment made through borrowed capital as eligible investment of fixed capital for the purpose of computing limits of exemption without adjusting the liability of repayment of such borrowed capital from the value of investment made through such borrowed capital further goes to show that the emphasis is on the value of the assets without reference to liability attached to it. If, in this context, definition of eligible fixed capital investment is to be seen, it clearly comes out that the investment is the actual price that is suffered by the claimant of benefit for acquiring the fixed capital and not the estimated market value of the asset as on the date of the eligibility of the New Industrial Unit or the Expansion or Diversification in respect of which incentive is claimed. In connection with 'land', 'the actual price paid for the land to the extent needed but excluding land development charges' is only to be considered as capital investment in land. New building, new plant and machinery and investment in imported second hand machinery and installation expenditure capitalised for plant and machinery, capitalised interest during construction not exceeding 5% of the total fixed capital investment, technical knowhow fees or drawing fees paid in lumpsum to foreign collaborators or foreign suppliers as approved by Government of India or paid to laboratories recognised by the State Government or Central Government are to be considered capital investment for the purpose of computing extent of incentive as well as eligibility criterion. Other investments in any other asset or by any other method is ruled out by making it clear in Note (i) that "working capital" (whether raised through banks or otherwise and including working capital margin), goodwill fees, engineering fees, commissioning fees, commissioning expenses, royalties capitalised or otherwise, pre-operative expenses, expenditure on trucks, cars, vans, trailers, tractors and transport vehicles and catalysts will not be considered as eligible fixed capital investment for the purpose of the scheme. It also ruled out installation expenses or investment made in plant and machinery used anywhere in India. It is in this context that the expression used in clause (ii) and in note appended to clause (c) has to be read which used that 'only those assets which are acquired and paid during the operative period of this scheme will be eligible for the sales tax incentives under this scheme.' It is to be seen that if the word 'paid' is to be considered as actual payment as suggested by learned counsel for the revenue, it will make the scheme unworkable. The requirement in the aforesaid note is not

that the actual payment should be made as on the date of acquisition but any time 'during the operative period of the scheme'. In other words, assets included in term capital investment which have been acquired on credit as on the date the eligible unit does in for commercial production, the date with effect from which the period for availing benefit of incentive, whether of deferment or of exemption, commences, it can actually be paid to seller any time during which the investor can avail benefit, inasmuch as for him the scheme continues until then. We have noticed above that in computing capital investment, the actual investment in acquiring the assets referred to in clause (c) may be on borrowed capital. Simply because as on that date the price is not paid though the liability to pay the price is pending, would not be excluded on literal interpretation of clause (ii) to Note as on that date when the Industries Department is to consider for issuing eligibility certificate and thereafter the Commissioner of Sales Tax is to consider for issuing a certificate of entitlement. In consonance with stand of respondents, if the asset is acquired and actual price is already paid to the seller, no difficulty will arise, notwithstanding the price is paid out of borrowing. In case price is not paid immediately, how the thing proceed, answer gets blurred. Whether the acquisition will be included then and will be reviewed at the end of scheme to find whether amount has been actually paid or will defer the certificate until payment is made or period of scheme expires? Then what consequence it takes, if , at the time the value of asset is included and it remains unpaid at the end of the period of operation of scheme, the scheme does not say anything about that. It cannot be envisaged that the issue of eligibility certificate or the certificate of entitlement shall await until expiry of the period of the scheme. It cannot also be envisioned that issuance of certificate, which has its purpose to serve when the new unit, or expansion of a division, begins operation, will be deferred until such payment. That will be frustrating the very object of the scheme, which promises a reduced price structure for the new producer to withstand competition of existing product in the market. Therefore, in our opinion, the interpretation suggested by the revenue founded on the literal expression of the word "paid" leads to such a situation which would make the scheme unworkable as shall be presently seen, cannot be accepted.

15. The one striking feature is that if the asset is acquired on a particular date for the payment of which money is borrowed from market and the liability to the

seller is discharged, the resultant position is that though the assessee has acquired the assets and paid to the seller, his liability to pay the amount of the price which is out of the borrowed money does not come to an end. In other words, against value of asset such liability to repay the amount of the debt exists. There is no suggestion that even in that event the liability of the borrowed capital has to be discharged during the operative period of the scheme. In other words, while borrowed capital in respect of outstanding liability towards capital borrowed for payment of same asset the person will be entitled to include price of such capital asset in computing capital investment at all times, but an assessee standing in the very same situation, when seller places himself in position of a creditor, by deferring the payment of the price, shall fall foul with the scheme. In the latter case, as per interpretation suggested by the respondent, this can be determined only at the close of the scheme and not at the time of the commencement that too depending upon whether price has actually been paid to the seller. It is irrelevant whether such price is paid by borrowing money from market, creating a parallel liability. It would place two assessees situated similarly, in the matter of having liabilities against acquisition of assets on different platforms, one borrowing money from market continuing to remain eligible throughout the scheme and entitled to retain the fruits of the incentive benefits arising from the operation of the notification or the exemption, and vis-a-vis the other person who has availed the same credit facilities from the seller himself will be ousted from the same benefit will be placed at a disadvantageous position. The object of the scheme is not to give incentive on borrowings from market but is to give incentive on establishing new industrial units or expanding the existing unit for economic growth. It shows no nexus to source of credit facility with object of scheme. Any interpretation giving such discriminatory result ought to be avoided.

16. There is yet another way of looking at the scheme. It is not that entire fixed capital investment in generic sense is eligible for incentive. It is only the investment made in the land which has been acquired on payment of price, new building, new plant and machinery and imported second-hand machinery and installation expenses, capitalised for plant and machinery, capitalised industries during construction not exceeding 5% of the total fixed capital investment and the fees paid in lumpsum to foreign collaborators or foreign suppliers of the know-how or the drawing fees or

the laboratory charges that are the only avenues wherein investment made is to be considered as fixed capital investment. All other investments though may be falling within the meaning of fixed capital investment in popular sense are not to be considered eligible. If that be so, the fact that these assets or the capitalised value of interest whether it comes from the borrowed capital from source other than the suppliers or by credit generated due to payments deferred by supplier would not make any expansion in the limit of eligible capital investment. A new building constructed at a cost of Rs. 5 crores, whether 5 crores is borrowed from a financial institution and paid to the constructor or Rs. 5 crores remaining outstanding to be paid to the constructor, who has agreed to defer the payment, it is only Rs. 5 crores that would be considered as capital investment for computing eligible fixed capital investment notwithstanding person remaining liable to pay Rs. 5 crores to lender or constructor on a future date. It cannot happen that the borrowed capital which has not been utilised for the purpose of acquisition of any of the assets mentioned in clause (c) can find its way in computation of eligible fixed capital investment. Had it been the case, where by result of non-utilisation of borrowed capital for the purpose of fixed capital investment by generating other credit facilities were to result in expanding the base of eligible fixed capital investment without there being any real fixed capital investment, things could be viewed differently. In the present case that possibility is ruled out. In our pinion, no distinction can be made on the basis where from the credit comes for the acquisition of the eligible assets or on the ground whether the liability is met from own capital or from the capital borrowed from financing agencies or credit enjoyed as a result of deferred payment. The computation of investment in the five items referred to in sub-clause (c) of clause (iv) of the Resolution remains unaltered. In the circumstances the word 'paid' has to be understood in the sense the acquirer has incurred a legal obligation to make payment for such acquisition whether he discharges such obligation immediately or undertakes to discharge the same as a debt on later date. To deny the benefit of the incentive to the person enjoying one form of credit against a person enjoying another form of credit would render the scheme vulnerable to charge of being discriminatory. Law is well-settled. Such interpretation which renders any provision of law violative of any provision of the constitution is to be avoided unless the other view is not possible to take. In the context in which the term capital investment has been used, we are of the opinion that the definition

which takes its colour from the definition used in the resolution dt. 6th May 1986 referred to above and the meaning of word 'actual price paid' or 'acquired and paid' means that the capital investment relates to the acquisition of assets for consideration for which liability has been incurred to be discharged in present or in future but it does not extent to the acquisition of capital assessment simpliciter without incurring any liability to pay the price for it and that is related only to the actual price liable to be paid by the assessee on the date when he acquires it and cannot be related to any artificial sum by estimation of market value as on the date eligibility is to be considered. Such liability to payments be incurred during the currency of the scheme, in the sense during which the commencement of New Industrial undertaking or Expansion or Diversification will be eligible for operation of incentive and not in the sense during the period for which it operates for the beneficiary. Actual payments during that period is not a condition of its treatment as Capital Investment. To illustrate, instead of acquiring land, the assessee brings a land which is already owned by him. If assessee himself has acquired the land by paying price for it in past, it is the actual price paid by him for land which shall be the capital investment and not the value of the land on the date on which it has been brought by way of investment in the New Industry/Expansion or Diversification. So also any assets brought into new industrial unit, expansion or diversification, as the case may be. If the assessee has not been subjected to any liability towards its acquisition because he may have acquired it by dint of succession, gift or any other form in which he does not have to pay the price for it, notwithstanding that the same forms part of the capital structure of the undertaking, for the purpose of eligible fixed capital investment for quantifying the limit of benefit under Entry 175 or for deferment under the Resolution dt. 6th May 1986 the same cannot be considered as part of eligible fixed capital investment. Giving any other meaning to the words 'acquired and paid', in our opinion, would render the scheme unworkable and expose the scheme to the vice of being suffering with hostile discrimination, there being no rational object for such classification appearing from the scheme or the provisions of the notification.

17. We, therefore, allow this special civil application and direct the respondents to recompute the amount of eligible fixed capital investment and corresponding eligible amount of tax exemption for which

the petitioner has obtained exemption in accordance with law afresh and issue necessary certificate within one month from the date of receipt of the writ.

18. The subsidy scheme contained in the Government Resolution dt. 5.5.1986 uses the same expression in the matter of defining eligible fixed capital investment in respect of industrial undertakings to which benefit of incentive has been extended is identical, it is further directed to recompute the amount of subsidy to which the assessee is considered eligible in terms of the observations made above, and give effect thereto.

Rule is made absolute. There shall be no order as to costs.

Direct service permitted.

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